THE JEWS AND THE ENGLISH LAW.

II.

WE have seen that since the year 1685[1] the Jews have been allowed the free exercise of their religion in this country and have been protected by the courts of law against a gross libel upon it—such as the oft-repeated blood-accusation—when published in such a way as to stir up hatred against the Jews and thereby ultimately lead to a breach of the peace; but it must not be supposed that the law of England ever encouraged the propagation of doctrines subversive of the Christian religion, which has always been and is still considered part of the common law of the land. In the year 1698 an Act of Parliament was passed entitled "An Act for the more effectual suppressing of Blasphemy and Profaneness[2]." The preamble runs: "Whereas many persons have of late years openly avowed and published many blasphemous and impious opinions contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God and may prove destructive to the peace and welfare of this kingdom, wherefore for the more effectual suppressing of the said detestable crimes" it is enacted that "if any person or persons, having been educated in or at any time having made profession of the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking, deny any of the Persons in the Holy Trinity to be God, or shall assert or maintain there are more gods

[1] The Order in Council in answer to the Petition of Joseph Henriques and others having been made on November 13 of that year.

[2] 9 Will. III. c. 35, more commonly cited as 9 & 10 Will. III. c. 32.

than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority," he or they shall upon being convicted for the first time be rendered incapable to hold any office ecclesiastical, civil, or military, and if convicted a second time of all or any the aforesaid crimes, then he or they shall from thenceforth be disabled to sue in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed or gift, and shall also suffer imprisonment for the space of three years without bail or mainprize from the time of such conviction. This Act still remains in the statute-book, and may at any time be enforced. In the year 1819 the full Court of King's Bench held that the offences aimed at were in many cases misdemeanours at common law, and that the Act enabled the judges to inflict cumulative punishments in addition to the ordinary common law punishment of fine and imprisonment[1]. It was, however, recognized that there might be cases in which persons could be dealt with under this Act, though guilty of no offence under the common law. Mr. Justice Best in his judgment says: "The Legislature, in passing this Act, had not the punishment of blasphemy so much in view as the protecting the government of the country, by preventing infidels from getting into places of trust. In the age of toleration in which that statute passed, neither churchmen nor sectarians wished to protect in their infidelity those who disbelieved the Holy Scriptures. On the contrary, all agreed, that as the system of morals which regulated their conduct was built on these Scriptures, none were to be trusted with offices who showed they were under no religious responsibility. This Act is not confined to those who libel religion, but extended to those who in the most private intercourse, by advised conversation, admit that they disbelieve the Scriptures. Both the common law and this

[1] See *Rex* v. *Richard Carlile*, 3 B. & Ald. 161 (1819). See also Lord Eldon's remarks, 3 Mer. p. 406 seq. (1817).

statute are necessary; the first to guard the morals of the people; the second for the immediate protection of the government[1]." In the year 1813, in favour of Unitarians, the Act, so far as it relates to persons denying any one of the Persons in the Holy Trinity to be God, was repealed[2], and this concession was at the time regarded as a signal proof of the liberality and religious toleration of the age; but the remainder of the Act is still nominally in force. It might be made use of to prevent conversions from Christianity to Judaism, if these should ever take place upon a large scale, or any active missionary organization were established among the Jews for this purpose. For though the offence struck at by the statute can only be committed by persons who have been educated in or made profession of the Christian religion, still by the law of England all persons who instigate or aid and abet or are accessory to a misdemeanour committed by others are themselves guilty of a misdemeanour and punishable in the same way as those guilty of the principal crime; the law not recognizing any distinction in the punishment of crimes lower than felony. Hitherto there has been no occasion to attempt to use the statute in this way; should, however, one arise, the bitterness of religious controversy would probably prompt such an attempt, there being no other mode of repressing proselytism by the criminal law not foredoomed to failure.

The statute has a curious history for the Jews, though it may safely be affirmed that no Jew was ever prosecuted under it. It originated in a humble address presented by the Commons to His Majesty asking for the suppression of "profaneness and immorality in all books which endeavour to undermine the fundamentals of the Christian religion and to punish the authors[3]," and that His Majesty should issue a Royal Proclamation to that effect. The address was drawn up by a committee of the House of Commons

[1] 3 B. & Ald. p. 166. [2] 53 Geo. III. c. 160, s. 2.

[3] Cobbett's *Parl. History*, vol. V, p. 1172.

appointed on February 9, and was presented to the King on the 17th. The King expressed his satisfaction at the receipt of this address, and immediately gave directions for the publication of the Proclamation asked for, and at the same time expressed a wish that more effectual provision should be made by the Legislature for suppressing the evils complained of. This Royal Proclamation or its successor, framed in a great measure upon the words of the parliamentary address presented to the King, is still publicly read in every county town throughout the country at the opening of every commission of assize and quarter sessions. The Bill for more effectual suppressing of blasphemy and profaneness, the substance of which has been already set forth, was also introduced in deference to the expression of the royal wishes contained in the King's answer. When the Bill reached the Lords, an amendment to omit the words "having been educated in or at any time having made profession of the Christian religion" was proposed and carried. The effect of this amendment would obviously be to render every Jew resident in the kingdom liable to the same pains and penalties provided by the enactment, including three years' imprisonment in the case of a second conviction. The House of Commons rejected the amendment, and appointed a committee to draw up reasons to be offered at a conference of the Lords for disagreeing with it[1]. Reasons were accordingly drawn up, read to the House, and agreed to; they are of sufficient interest to be given verbatim, and are as follows:—

"The Commons do conceive, That the First Amendment in the First Skin, Line 14, 15, made by your Lordships, will subject the Jews who live amongst us to all the Pains and Penalties contained in the Bill; which must therefore of necessity ruin them, and drive them out of the Kingdom; and cannot be thought was the intention of your Lordships, since here they have the means and opportunities to be informed of and rightly instructed in the principles of the

[1] Commons' Journals, May 18, 1698.

true Christian Religion; for which Reasons the Commons disagree with your Lordships in the said Amendment[1]." The Lords showed that the ruin and expulsion of the Jews was not intended, by allowing the Bill to pass without the obnoxious amendment.

The conduct of Parliament in preventing an injustice being done to the Jews then but recently settled in the kingdom should not pass unnoticed, especially as it could not in any way have been influenced, as Parliament is nowadays so often, by a desire to conciliate Jewish votes, for at the time there was probably no Jew entitled to exercise the Parliamentary franchise. The alleged motive of the Commons in protecting the Jews, strange as it may seem to us, is probably the true one. The gentlemen of the House of Commons perhaps really thought that the Jews, if they only had an opportunity of being instructed in the principles of the true Christian religion as enunciated by the Church of England, would be ultimately converted to Christianity, a result which would not ensue if they were driven by unjust laws to lands belonging to Christendom no doubt, but shrouded by the darkness of false Papal or Lutheran doctrine. At any rate, we can see that there was in those days, as in these, an intense desire to bring the Jews into the Christian fold. As no exception in their case was made, and the matter had been discussed, it was evidently intended that Jewish proselytes to Christianity, if they relapsed into Judaism, should be dealt with under the Act. Though such cases are constantly arising, there is no trace of any prosecution under the Act having ever taken place. It may be that the knowledge of the revelation of the methods employed by the conversionists which in such a case would inevitably be made has effectually deterred those imbued with the missionary spirit from undertaking such a prosecution; or it may be that it has never been thought worth while to exact the penalty which in the case of a first conviction is merely incapacity

[1] Commons' Journals, May 21, 1698.

to hold any office, ecclesiastical, civil, or military, a punishment which would be of little effect in almost every case of double apostasy, for the persons who publicly indulge in numerous changes of their religious profession have rarely any reasonable expectation of attaining any of the offices from holding which the Act debars them. In any cases the Act, though it still appears in the statute-book, has been allowed to become a dead letter.

The freedom accorded to the practice of the Jewish religion in this country has now been dealt with in outline. It has been shown how the Acts compelling outward conformity with the religion of the Established Church were not enforced against the Jews, and how, when a gross and malignant libel upon the rites of the Jewish religion likely and intended to lead to violence against its votaries was published, the courts of law were ready to inflict punishment upon its author. On the other hand, two Acts were placed upon the statute-book, one compelling Jews whose children might become converted to Protestantism to provide them with suitable maintenance; the other enabling a criminal prosecution to be brought against Jews who should obtain proselytes from Christianity. Of these statutes the first was repealed in 1846; the second has never been acted upon, though it still remains a part of the law of England. I will now turn to the legal position of endowments created for the purpose of furthering the Jewish religion. Such endowments are constituted by vesting the property which is the subject of them in a trustee or trustees in trust for or to the use of the institution intended to be benefited. But any trust which has for its object the propagation of religious views not tolerated by the law in force at the time will be held void by a court of justice as being contrary to the policy of the law. If a charitable purpose can be discovered in the document creating the trust, the court will apply the property to some other charitable purpose; and if no charitable intention appears, will vest it in the person who would have been entitled if

the trust had never been created. Thus before the year 1688, when the Toleration Act was passed, gifts in favour of the places of worship, ministers, and schools of Protestant Dissenters were invalid [1]. As to the effect of the Toleration Act, Lord Mansfield is reported to have said that Nonconformity is rendered by it "not only innocent but lawful," and that the protecting clauses of the statute "have put it not merely under the connivance but under the protection of the law—have established it. For nothing can be plainer than that the law protects nothing in that very respect in which it is at the same time in the eye of the law a crime. Dissenters by the Act of Toleration therefore are restored to a legal consideration and capacity [2]."

It has already been shown that the provisions of the Toleration Act were confined to Protestant Nonconformists, and that the Jews received no benefit under it, and it was not until 1846 that Jewish religious endowments were made valid. Several cases came before the courts; for instance, in the year 1744 the case of *Da Costa* v. *De Paz* was tried. It is reported in Ambler at p. 228, and in 1 Dickens at p. 258; but as Lord Eldon, in giving his decision in *Moggridge* v. *Thackwell*, complained that these reports are not very accurate [3], the subjoined account is taken from a note extracted from Mr. Coxe's MSS. in Lincoln's Inn Library by Mr. Swanston [4]. Elias de Paz, by his will dated November 4, 1839, directed his executors to invest a sum of £1200 in some government or other security, and directed that the revenue arising therefrom should be applied for ever in the maintenance of a Yesiba or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion, and directed that his executors during their respective lives should have

[1] *Att.-Gen.* v. *Baxter*, 1 Vern. 248, decided in Trinity Term, 1684, revised in 1689 after the Revolution, 2 Vern. 105.

[2] 3 Mer. p. 376 (note).

[3] See 7 Ves. p. 76.

[4] 2 Swanston, p. 487 seq.

the management of the assembly. The bill was to have this £1200 laid out according to the will. Lord Hardwicke, the Chancellor, in delivering his judgment, said: "This case requires two considerations: first, whether the legacy in question is good and such as this court can or ought to establish? and secondly, if not, whether it is void absolutely, or only to the particular intent, so as to leave it a general legacy, and such as the crown may dispose of? As to the first, I am of opinion that it is not a good legacy, and ought not to be established, no such instance being found. Nobody is more against laying penalties or hardships upon persons for the exercise of their particular religion than I am; but there is a great difference between doing this and establishing them by acts of the court. The cases of dissenting ministers before the Toleration Act were different; particularly Baxter's case, was not of an illegal bequest, but was a bequest for poor ejected ministers; and even as to this case of the Jewish religion, it would be for a different consideration were it for the support of poor persons of that religion. Orders are made by me and the Master of the Rolls every year upon petitions made for their support as poor people. But this is a bequest for the propagation of the Jewish religion; and though it is said that this is a part of our religion" (it having been argued that this bequest was only for propagating and reading that law which is allowed in the Church, and which is the foundation of the Christian religion), "yet the intent of this bequest must be taken to be in contradiction of the Christian religion, which is a part of the law of the land, which is so laid down by Lord Hale and Lord Raymond; and it undoubtedly is so; for the constitution and policy of this nation is founded thereon. As to the Act of Toleration, no new right is given by that, but only an exemption from the penal laws. The Toleration Act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the Dissenters under certain regulations and tests. This renders those

religions legal, which is not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the Legislature." The Lord Chancellor accordingly came to the conclusion that the legacy was not good in law, and ought not to be decreed or established by the court. The second question, namely what ought to be done with the sum of £1200, the amount of the legacy, was considered more doubtful, and the further consideration of it reserved. Upon the further consideration of the matter, the court decreed that the money ought not to accrue to the residue of the personal estate of the testator, but ought to be applied to some other charitable uses, and that the appointment thereof belonged to the Crown; and ultimately the King by his sign manual was graciously pleased, upon the humble petition of the Governor of the Foundling Hospital, to give £1000, part of the sum of £1200, towards supporting a preacher and to instruct the children under his care in the Christian religion and for incidental expenses, &c. It is not known what became of the remaining £200, but if it was not absorbed in costs, it was probably devoted to a similar purpose. And so the money went to a charitable purpose, upon the principle that where the court cannot carry out the intention of the testator, as being against the policy of the law, it may substitute a different charitable object for his bounty. As regards the particular substitution in this instance, I cannot refrain from quoting the words of Lord Eldon: "It would have caused some surprise to the testator if he had known how his devise would have been construed[1]." The same judge says in another case: "It is very difficult, I think, seeing that intention to build a Jewish Synagogue, to discover an intention to build[2]

[1] In *Att.-Gen.* v. *Mayor of Bristol*, 2 J. & W. 308 (1820).

[2] But the money was not employed in building, but in supporting a preacher and instructing children in the Foundling Hospital in the Christian religion. This was probably unknown to the Chancellor, who could not consult the second and more correct edition of Ambler, which was not published till 1828.

a Foundling Hospital, rather than that the money should not be applied: but the court has said so always[1]."

Da Costa v. *De Paz* was not an isolated case; the principle laid down by Lord Hardwicke, that bequests for advancing the Jewish religion were invalid, though bequests for the support of poor persons of that religion were good, was regularly acted upon when similar dispositions came before the court. An example is the case of *Isaac* v. *Gompertz*, which came before the Master of the Rolls in 1783, but was not finally decided till 1786. Benjamin Isaac by his will left several annuities: first, an annuity of £20 for teaching and instructing ten poor Jews' children at Bromsall; £40[2] for the support and maintenance of the Jews' Synagogue in Magpie Alley; and £30 for teaching and instructing ten poor Jews' children in London; £20 to be given away every New Year's Day among poor Jews; and £30 to be laid out and expended every year in the purchase of coals to be given away and distributed among poor Jews and their families, &c. All the legacies were allowed except that given to the synagogue; as to which the order of the court was: "And as to the annuity of £40 given for the support and maintenance of the Jews' said synagogue in Magpie Alley, it was declared that the same ought not to fall and accrue to the personal estate of the said testator, but ought to be applied to some other charitable use, and that the appointing and directing that charitable use was in the Crown; and this court doth recommend it to His Majesty's Attorney-General to apply to the King for a sign manual to appoint and direct to what charitable use or uses the said annuity of £40 and the arrears shall be applied[3]." The legacy was ultimately divided into

[1] *Moggridge* v. *Thackwell*, 2 Ves. p. 81 (1802).

[2] Ambler's note gives £10; but this must be a misprint. See the end of the note.

[3] See Ambler, p. 228 (note), and 7 Ves. p. 61.

moieties; one moiety being given to the Magdalen Hospital, the other to the London Infirmary [1].

It would not be right while dealing with this subject to omit the case of *Straus* v. *Goldsmid*, heard by Sir L. Shadwell, Vice-Chancellor of England in 1837. There the testator bequeathed one-third of his residuary personal estate in the following words: "The remaining third of the above residue to be given to the Rulers and Wardens of the Great Synagogue in this City of London in the manner hereinafter mentioned: that is to say, the interest or dividends arising from this third to be, every year on the Eve of the Passover, distributed at least among ten worthy men who have wives and children, among whom there ought to be some learned men, to purchase meat and wine fit for the service of the two nights of Passover." The reporter states that the Vice-Chancellor held that the bequest, being intended to enable persons professing the Jewish religion to observe its rites, was good [2]. I cannot help thinking that this decision is misreported; for otherwise it is contrary to the accepted authorities already quoted. It might have been based on an intention to support poor persons of the Jewish faith by providing them with suitable viands on stated occasions, but could not, conformably with the generally received theory of the law, have been founded on intention to maintain Jewish rites and observances, for the Jewish religion had not yet received the benefit of the Toleration Acts. This benefit had already been conferred on Roman Catholics by the Roman Catholic Charities Act of 1832 [3], but it was not extended to Jews till 1846. On August 18 of that year the Act "to relieve Her Majesty's subjects from certain penalties and disabilities in regard to religious opinions [4]" became law. It expressly repealed many Acts imposing religious disabilities, and in section 2 provides: "That

[1] See note to *Att.-Gen.* v. *Burgman*, 1 Dickens, p. 169.
[2] 8 Simeon, pp. 614–5.
[3] 2 & 3 Will. IV, c. 15.
[4] 9 & 10 Vict. c. 59.

from and after the commencement of this Act Her Majesty's subjects professing the Jewish Religion in respect to their Schools, Places for Religious Worship, Education and Charitable Purposes and the Property held therewith, shall be subject to the same Laws as Her Majesty's Protestant Subjects dissenting from the Church of England are subject to, and not further or otherwise."

The legal status of the religious endowments of Protestant Dissenters is well summarized by Lord Eldon in the following words: "I take it that, if land or money were given (in such a way as would be legal notwithstanding the statutes concerning dispositions to charitable uses) for the purpose of building a church or a house, or otherwise for maintaining or propagating the worship of God, and if there were nothing more precise in the case, this court would execute such a trust, by making it a provision for maintaining and propagating the Established Religion of the country. It is also clearly settled that, if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters—promoting no doctrines contrary to law, although such as may be at variance with the doctrines of the Established Religion—it is then the duty of the court to carry such a trust as that into execution and to administer it according to the intent of the founders[1]."

At the present time therefore Jews are practically in the same position as Protestant Dissenters in respect of their religious endowments, and can as a general rule with reason anticipate that any endowments they found will be carried into effect. But it must be remembered that the operation of the Act is expressly confined to schools, places for religious worship, education, and charitable purposes, and that any endowment which cannot be brought under one of these four heads will still be subject to the old law, and might therefore be declared void on the principle of the old cases. However, the courts of law, which have

[1] *Att.-Gen.* v. *Pearson* (1817), 3 Mer. 353, at p. 409.

always given a wide interpretation to the Acts of Toleration and even made them retrospective in their operation[1], would in all probability be favourably inclined to include a Jewish endowment under one of the four heads mentioned in the statute, if that were possible. If it were impossible, it might be argued—whether successfully or not cannot be predicted, as no such case has yet arisen—that the law, having now recognized the Jewish religion and in some ways protected it, has made it legal not merely for some but for all purposes, and therefore that the reasoning on which the old cases are based no longer holds good, and the principle evolved from them is no longer law.

It should also be stated that Jewish are in no better position than other endowments. They are subject to be defeated by reason of non-compliance with the statutes relating to mortmain, or on account of infringing the rules against perpetuity (unless they can be brought within the category of trusts recognized by the law as charitable) or as being contrary to public policy. There are no reported cases relating to the failure of endowments under the first two heads of special interest to Jews, but it will not be out of place to mention here two cases arising under the third. The first is *Habershon* v. *Vardon,* which came before Vice-Chancellor Sir P. L. Knight-Bruce in 1851. Nadir Baxter had by his will, dated in 1842, directed as follows: "That other £1,000, out of such part of my personal estate as may by law be devoted to charitable purposes, be paid towards the contributions that I do confidently believe and earnestly pray will speedily be begun to be raised under the sanction of our hitherto so highly favoured church and nation, in evidence of Christian faith towards the political restoration of the Jews to

[1] See *Bradshaw* v. *Tasker,* 221 (1834, before Lord Brougham). The correctness of the decision in this case was doubted by Sir Ed. Sugden (L.C.) in *Att.-Gen.* v. *Drummond,* 1 Or. & War. p. 380 (1842), but was followed by Sir John Romilly (M.R.) *in re Michel's Trusts,* 28 Beav. 39 (1860).

Jerusalem, and to their own land." The Vice-Chancellor held that the gift of £1,000 was void. "If," said he, "it could be understood to mean anything, it was to create a revolution in a friendly country. Jews might at present reside in Jerusalem; and, if the acquisition of political power by them was intended, the promotion of such an object would not be consistent with our amicable relations with the Sublime Porte[1]." This case was decided five years after the legal recognition of the Jewish religion in 1846, and is therefore still binding on the courts of first instance. Trusts in favour of the present Zionist propaganda, unless very carefully framed, might on the same principle be declared void.

The other case is in the matter of Michel's Trust. It occurred in 1860, and was a special case seeking the opinion of the court under the following circumstances. The testator, Abraham Michel, a Jew, by his will made the following bequest, which was to take effect on the death of his widow. "I give and bequeath unto my executors so much money as will produce in government securities the sum of £10 sterling per annum, upon this special trust and confidence (that is to say), upon trust to invest the same in government securities, as they shall think best, and to pay the interest thereof or dividends, yearly or half-yearly, so as they my executors shall think proper, unto the parnosim or wardens of the congregation of Ostrovesy, near Opateir, in Little Poland, for the time being; but my will and mind is, that the said parnosim or wardens do pay the said sum of £10 to three qualified persons, chosen by them from and out of my family, to learn, in their Beth Hammadrass or college, two hours daily for ever, and on every anniversary of my death, to say the prayer called in Hebrew Candish[2]; and in case there should be no one of my family qualified thereto, then or in such case my will and mind is, that the said parnosim or wardens pay the same to three persons qualified."

[1] 4 De G. & Sm. 467. [2] Thus spelt in the report; properly *Kaddish*.

The testator died in 1821, and his widow in 1822. The executors appropriated the sum of £300, £3 per cent. consolidated annuities, to answer the above trust, and for some years after such investment had taken place the dividends were remitted to the parnosim or wardens of the congregation at Ostrovesy, but, many years since, the remittance was discontinued, in consequence of its being considered that the bequest was invalid.

The stock not having been dealt with, the surviving executor presented a petition seeking the opinion of the court on the following points: first, whether the legacy in question was a valid charitable legacy, and secondly, if valid, how the stock and cash representing the legacy, and in particular how the sums representing arrears of dividend and the accumulations thereof, ought to be paid and applied.

It was stated that the term to "learn in the Beth Hammadrass or college for two hours daily" signified to study either the Bible or the Talmud, and that the "Candish" was a short Hebrew prayer in the praise of God, and expressive of resignation to his will. That both were acts of piety, and that the prayer was generally said by the sons of the deceased, during the year of mourning and on the anniversary of the death, but if there were none, it was either said by the relatives or by some other person.

The Master of the Rolls, Sir John Romilly, had no doubt of the validity of the bequest, and held, on the analogy of the cases decided with regard to Roman Catholic charities, that the Act of Parliament (9 & 10 Vict. c. 59) was retrospective in its operation. Referring to the argument advanced on behalf of the residuary legatees that the gift was void as a superstitious use, as an anniversary or obit, and similar to praying for the testator's soul, the learned judge said, "I see nothing in the bequest which is superstitious. It was attempted to show that it was so, by importing into it the assumption that the prayer offered up on the anniversary of the death of the testator must be

intended to be for the benefit of the soul of the testator.... There are many cases of superstitious uses unconnected with prayers for the soul; but in regard to *West* v. *Shuttleworth*[1] and *Heath* and *Chapman*[2] I have always felt this difficulty:—so far as relates to their places for religious worship and the property held therewith, Roman Catholics and Jews are now placed in the same position as Protestant Dissenters; and if it be part of the forms of their religion that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question, which practically have authorized them. In the time of Edward the Sixth and Elizabeth the ceremony of the mass was considered superstitious, and I do not know that the law made any distinction between masses generally and masses for souls, or any distinction between those said for the general purpose and object of their religion in the worship of God and those which are for more limited objects, which were formerly considered superstitious, and which the court now, considering them in a Protestant point of view, still regards as superstitious. I express no opinion on this point, however, as no such case arises here.

"Here nothing is said as to praying for the soul of any one. Three persons are to learn in their Beth Hammadrass or college, and to say a prayer called Candish, and from the information given to the court, it appears that this means that they are to study either the Bible or the Talmud, and with respect to the Candish, that it is nothing but a short Hebrew prayer in the praise of Almighty God. This has no reference to praying for souls of the founders, and I do not know that there would be anything superstitious in a bequest by members of the Church of England to wardens to select a scholar to learn the Greek Testament

[1] 2 Myl. & K. 684. [2] 2 Drew. 417.

two hours daily, and on a certain day to repeat the Lord's Prayer, although the day selected may be the anniversary or birthday of the founder. There is nothing here to show that this was to be done under the notion that the soul of the testator would derive any benefit from it. I think that this is a valid gift for the benefit of a Jewish charity, and that the executor must pay over the dividends to the parnosim or wardens, who are to select the three qualified persons as directed by the will[1]."

In re Michel's Trusts the bequest was upheld, but the case shows that a religious trust may still be set aside as being a superstitious use, and therefore contrary to public policy. It would be extremely difficult to define precisely what is a superstitious use; but the term undoubtedly includes, and is perhaps confined to, any trust which has for its object the performance of any acts for the supposed benefit of the soul of any person whatsoever. This doctrine that all such trusts are void has never come before the House of Lords, but has been repeatedly acted upon by the other courts, and must be considered part of the law of England. The doctrine is somewhat anomalous, inasmuch as prayers for the dead are not prohibited by the Church of England, as was judicially held in the Court of Arches by Sir H. Jenner so long ago as 1838[2]. Before the Reformation trusts of this nature were considered valid and enforced by the courts, but in the reign of Henry VIII and Edward VI two statutes[3] were passed annulling them in certain cases, and though such trusts do not as a rule come within the letter of these statutes, for there is no statute making superstitious uses void generally, they are nevertheless held to be void by the general policy of the law. We have already seen that Lord Romilly *in re Michel's Trusts* was inclined to doubt the validity of this doctrine

[1] *In re Michel's Trusts*, 28 Beav. pp. 39–43.

[2] *Breecks* v. *Woolfrey*, 1 Curt. Eccl. Rep. 880.

[3] 23 Hen. VIII. c. 10, repealed by the Mortmain and Charitable Uses Act, 1888, and 1 Edw. VI. c. 14.

after the legalization of the Roman Catholic religion, but in the following year he was constrained to acquiesce in it. Speaking of his remarks *in re Michel's Trusts*, he said, "I expressed my difficulty in the case referred to, as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality; but I think the decided cases too strong, and that the House of Lords alone can alter the settled law. It is clear that I must act on *West* v. *Shuttleworth*, which I cannot overrule[1]." And in a recent case Vice-Chancellor Hall held as a matter of course that a bequest of £10, to be expended in saying masses for the testator's soul, was void[2].

I have dealt with this subject at some length because it is a practice in certain synagogues on the second day of the festivals, and on the day of Atonement in some congregations which have adopted a reformed ritual (though happily it has not been recognized by the West London congregation of British Jews, the principal body of reformers in this country), to hold prayers for the benefit of the souls of deceased members, who are mentioned by name—a certain sum as a rule being paid on account of each name which is read out. It seems to me upon the decided cases that any legacy left for this purpose is invalid, nor would the case be different, provided that the testator was a domiciled Englishman, if the money so bequeathed is to be paid for a religious service of this kind to be performed in a country where it is not considered superstitious[3].

Gifts given for this purpose are simply void, but there is no power in the court or in the Crown to apply them

[1] *In re Blundell's Trusts* (1861), 30 Beav. p. 360.

[2] *In re Fleetwood, Sidgreaves* v. *Burder* (1880), 15 Ch. D. 594, at p. 609.

[3] See *in re Elliott* (1891), W. H. p. 9, where Mr. Justice North held that a bequest of £2,000 to the Priests of the Society of Jesus at Richmond, Victoria, to be spent in masses for the souls of the testator (a domiciled Englishman) and his wife, was bad, although by the law of Victoria the gift was good.

to some other religious or charitable purpose different from that indicated by the donor, as was done in the cases, already cited, relating to endowments for the purpose of promoting the Jewish religion before the benefit of the Toleration Acts had been extended to the Jews. The reason for this is that charity is not the object of such gifts. The intention is not to benefit the place of worship, or priest officiating in it, but to secure some supposed benefit to the donor's soul. This principle is well laid down in the judgment of the Privy Council delivered by Sir Montague Smith in the case of *Zap Chea Neo* v. *Ong Cheng Neo*, in which a devise of a house for performing religious ceremonies to the testatrix and her late husband was declared void. "The remaining devise to be considered is the dedication by the testatrix of the Soro Chong House for the performance of religious ceremonies to her late husband and to herself." It appears to be the usage in China to erect a monumental tablet to the dead in a house of this kind, and for the family at certain periods to place, with certain ceremonies, food before the tablet, the savour of which is supposed to gratify the spirits of their deceased relatives. This usage, with the accompanying ceremonies, is minutely described by Sir P. Benson Maxwell, in his judgment in the case of *Choah Chron Nish* v. *Spottiswood*[1]:—

"Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this Soro Chong House bears a close analogy to gifts to priests for masses to the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own was held, in *West* v. *Shuttleworth*[2], not to be a charitable use, and, although not

[1] Wood's *Oriental Cases*.

[2] 2 Myl. & K. 684.

coming within the statute relating to superstitious uses, to be void[1]."

It would seem to follow that before the year 1846 Judaism was not a religion recognized by law, and that a Jewish synagogue was an illegal establishment. There is, however, a reported case which seems to point in the opposite direction. On May 6, 1818, the case of Israel and others against Simmons was heard by Mr. Justice Abbott, at that time a puisne judge in the Court of King's Bench. The plaintiffs were the surviving lessees of certain premises in Denmark Court, Strand, which were used as a synagogue. The defendant had become a member of the synagogue twenty years before, and had paid his seat-rent up to the year 1810; he then seceded and attended another synagogue, but he retained the key, by which possession of the seat had been given to him, till the year 1813. The action was brought to recover the amount of the rent for that space of time, and also for certain offerings and sums alleged to be due from the defendant in respect of certain rites and ceremonies peculiar to the Jewish religion. The latter part of the claim was at the suggestion of the judge abandoned by the plaintiffs. It was contended by counsel on behalf of the defendants that the action was not maintainable in point of law, because the law of England did not tolerate Jewish synagogues. Great pains had been taken to investigate the subject, and it did not appear that there was any law which legalized the establishment of Jewish synagogues. The principal synagogue in this kingdom had been established under a royal grant, in the reign of Charles the Second; but it was not open to all people of that persuasion, without any grant or licence, to erect places of worship, according to their own pleasure, and to employ preachers at their own discretion. The Toleration Act did not embrace Jewish synagogues of any description; and since the doctrines preached there were in direct hostility to the Christian religion, such establish-

[1] L. R. 6 P. C. p. 396 (1875).

ments were to be considered as illegal. In answer to a question from the court, it was admitted that there was no written law which prohibited such establishments. In reference to this argument Mr. Justice Abbott said that since no authority could be produced to the contrary, he should certainly hold that such establishments were lawful, and consequently that the plaintiffs were entitled to recover[1]. The objection was accordingly overruled; however, a highly technical point referring to a misjoinder of plaintiffs was raised, and this being decided in the defendant's favour, judgment was entered for him. The case being decided upon a different point, Mr. Justice Abbott's ruling is of no great authority upon the matter now under discussion, and though it correctly represents the law as it exists at present, it is at least doubtful whether it could have been upheld at the time when it was given. The point was raised in the midst of a trial at Nisi Prius, and apparently decided at once without due consideration and without reference to the existing authorities, and under the impression that no authority to the contrary could be produced. The cases of *Da Costa* v. *De Paz* and *Isaac* v. *Gompertz* were, however, valid authorities to the contrary, and there can be little doubt that, if these had been cited to the learned judge, his ruling on this point would have been greatly modified. He might of course have attempted to distinguish the case before him from the earlier ones on the ground that it was a matter of contract and not the case of a trust; but such a distinction it would be difficult to uphold. The case is, however, of interest as showing the tolerant spirit which animated the court at the time; it being assumed that the Jewish religion was legal, unless an authority to the contrary was produced.

H. S. Q. Henriques.

[1] 2 Starkie, pp. 356–9.

(To be continued.)